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In the Supreme Court of the United States

OCTOBER TERM, 1946.

No. 564.

L. METCALFE WALLING,
Administrator of the Wage and Hour Division,
United States Department of Labor,
Petitioner,

v.

THE GENERAL INDUSTRIES COMPANY,
Respondent.

RESPONDENT'S BRIEF

In Opposition to Petition for Writ of Certiorari To the United States Circuit Court of Appeals For the Sixth Circuit.

CARL F. SHULER,
GLEN O. SMITH,
M. REESE DILL,
Union Commerce Building,
Cleveland, Ohio,
Attorneys for Respondent.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 9647

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RESPONDENT'S BRIEF

In Opposition to Petition for Writ of Certiorari To the United States Circuit Court of Appeals For the Sixth Circuit.

ARGUMENT.

THE FINDINGS OF THE DISTRICT COURT AND THE CIRCUIT COURT OF APPEALS PRECLUDE ALLOWANCE OF THE PETITION UNLESS CLEAR ERROR SHOWN.

In the statement in Rule 38 of the reasons which will be considered by this Court in passing upon the propriety of a petition for writ of certiorari to review the decision of a Circuit Court of Appeals, it is said that although they neither control nor fully measure the Court's discretion they do indicate what will be considered.

The petitioner, hereinafter called the Administrator, does not assign any reason for the allowance of the writ except an alleged conflict with the decision of this Court in the two cases, *Overnight Motor Company v. Missel*, 316 U. S. 572, and *Floyd v. DuBois Soap Co.*, 317 U. S. 596.

It may be assumed, therefore, that the Administrator agrees that the decision of the Sixth Circuit Court of Ap-

peals, affirming Judge Wilkin of the District Court for the Northern District of Ohio, was not in conflict with another decision of a Circuit Court of Appeals on the same matter and was not a decision of a question of Federal law which has not been but should be settled by this Court.

In order to claim an alleged conflict with the *Missel* and *Floyd* decisions the Administrator has devoted the major portion of his brief to a minute discussion of portions of the evidence in an effort to discredit the construction of the facts contained in specific findings of fact of the District Court and the decision of the Circuit Court of Appeals affirming those findings.

The rule is well settled that in such circumstances where two courts have agreed this Court will not enter upon a minute analysis of the evidence. *Boehmer v. Pennsylvania Railroad Co.*, 252 U. S. 496. Furthermore, even upon consideration of the evidence, this Court under an established rule accepts the findings unless clear error is shown. *Pick Manufacturing Company v. General Motors Corporation*, 299 U. S. 3.

WALLING v. BELO CORP. HAS DETERMINED THE ISSUE PRESENTED HEREIN.

The findings of fact by the District Court, for the most part based upon oral testimony, demonstrate strikingly their similarity to the facts presented to this Court in the case of *Walling v. Belo Corp.*, 316 U. S. 624. Finding number 10 and the first clause of Finding number 11 (R. 150, 151) are set forth seriatim because they succinctly state the facts attacked in the Administrator's petition.

> "(10) That prior to February 1, 1941 the Shift Foremen or Supervisors in the Steam and Electric Power Generating and Heating Department were compensated on an hourly rate; that the International Brotherhood of Firemen, Oilers and Helpers, Local No. 198, of Elyria, Ohio, claimed the right to represent the Shift Foremen as supervisors and through negotiations

with the defendant in their behalf arrived at an agreement that they would be compensated on a monthly salary basis, sufficient in amount to compensate them under the Fair Labor Standards Act for regular and overtime employment at the regular hourly rate of pay they were receiving prior to February 1, 1941; that the defendant and the Union agreed to submit to the National Labor Relations Board the issue of the right of the Union to represent the Shift Foremen or Supervisors.

"That pursuant to such agreement the Shift Foremen were changed to a salary basis on February 1, 1941 and the defendant, in order to avert the threat of a strike by the Union, dealt with the Union as the bargaining agent for the Shift Foremen pending a decision by the National Labor Relations Board of the right of the Union to represent them; that the amount paid in salary to Jasper Payne, Peter Spooner and Fred Stegman was more than the amount which they would have earned at the regular hourly rate of eighty cents (80¢) per hour paid prior to February 1, 1941, plus overtime pay under the Fair Labor Standards Act at the rate of time and one-half the regular hourly rate of pay for the scheduled work week of fifty-one (51) hours per week.

"That on July 25, 1944 Peter Spooner, Jasper Page and Fred Stegman signed an agreement with the defendant reading as follows:

> 'We the undersigned choose from henceforth to be regarded as Foremen, as in the past, with Foremen privileges and continue on a salary basis.'

"That on August 18, 1944, the Union, in its written contract with the defendant, agreed to settle the issue of the Union's right to represent Spooner, Page and Stegman by excluding them from the bargaining unit and abandoning their claim of the right to collectively bargain for Shift Foremen or Supervisors.

"(11) That throughout the period in question the defendant never intended to circumvent or evade the Requirements of the Fair Labor Standards Act, nor intended that compensation paid to its employees was

to be any less than the minimum required by the Act;" (R. 150, 151).

The Circuit Court expressly affirms and approves as follows at page 715 of its opinion reported in 155 F. 2d 711:

> "In an action to restrain violations of the Act the burden of proof rests on the Administrator to establish that the statute has been violated as to the engineers. The District Court found no evidence of intention to violate the act and affirmatively found that the employer had compensated the engineers in accordance with the statute. There was a conflict of evidence on this point but the finding of the District Court is supported by substantial evidence. While the men state that they received no overtime, their testimony is lacking in circumstantial detail while the testimony of the factory manager and one other witness is precise upon the exact point. The salary of these men was formerly paid on an hourly basis. A change to a salary basis was negotiated between the union and the employer, the salary being calculated to include an allowance of time-and-one-half for overtime. The men concede that there was a controversy with the union over their status, and that the shift from hourly to monthly compensation followed. The pay was figured in a shift from hourly pay to monthly salary at 80 cents an hour, which was the amount they would have earned at the regular hourly rate prior to February 1, 1941, plus overtime at the rate of time-and-one-half the regular hourly rate of pay for hours worked in excess of 40 for a scheduled work-week of 51 hours. It is not shown that any of these men ever worked more than eleven hours overtime each for the four weeks included in the monthly salary period, and for this time their salary includes an allowance of one-and-one-half pay for overtime. The District Court was correct in its conclusion that the appellee has compensated its non-exempt employees for overtime employment in accordance with the requirements of the Act and the injunction was properly denied.
>
> "The judgment of the District Court is affirmed."

As in the *Belo* case the facts reveal further that the three engineers received vacations with pay, special bonuses at the end of the year, full pay during periods of illness or other justifiable absences, and life insurance and pension benefits at Respondent's expense (Fdgs. 5, 6 & 7; R. 145-147). It is significant that hourly paid employees do not receive the foregoing perquisites of the salaried employees.

As in the *Belo* case the contracts between the Respondent and its three engineers were apparently satisfactory to the latter for not only have they not filed suit for additional overtime compensation but they have expressly requested continuance of the arrangement (Fdg. 10; R. 151).

As in the *Belo* case the Administrator here seeks a permanent and all-inclusive injunction against the Respondent although the petition only challenges a few of the large number of employees of the Respondent, and after two lower courts have found no violation of the law.

The *Missel* and *Floyd* cases upon which the Administrator relies involve fact situations completely different from this case. Missel was a rate clerk for a motor transportation company whose duties involved wide fluctuation in the time required, as opposed to the regular and continuous fifty-one (51) hour shift operation of the power plant by Respondent's three engineers.[1] Although Missel

[1] As an example of the misleading character of the Administrator's statements in his brief with respect to the record, he states that the hours the engineers "actually worked sometimes varied from 42 to 59½" (Admr's. brief page 5).

The only hours worked in excess of the regularly scheduled 51-hour week during the year 1944, used as an example in the case, occurred during four weeks in the fall because of a special and nonrecurring inventory situation requiring 8½ hours work on Sunday (R. 125-128). The Company obtained special permission from the Salary Stabilization Unit of the United States Treasury Department to pay the men extra straight time overtime for that occasion (R. 126). There was no other time during the period in question that the three engineers exceeded the scheduled 51-hour week. Certainly, it is improper to imply that during the four-year period 1941-1945 there was a variable work week.

was paid a weekly wage which upon the basis of the statutory minimum requirements of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. A. sec. 201), hereinafter called the "Act," could be construed as sufficient in amount to compensate for overtime at one and one-half times the statutory minimum rates, there was no contractual agreement with Missel based upon a rate per hour as in this case, and the *Belo* case.

The *Floyd* case is a simple one paragraph per curiam reversal of the Ohio Supreme Court which had decided the identical issue of the *Missel* case contrary to this Court's decision therein.

THE RECORD IS CLEAR THAT THE CONTRACT OF EMPLOYMENT SPECIFIED A REGULAR HOURLY RATE.

The Administrator in order to invoke the doctrine of the *Missel* case as support for this petition made the basic statement that:

> "The district court made no finding and the record contains no evidence that the contract of employment specified any regular or overtime hourly rate of pay." (Admr's. brief page 4.)

Apparently because the contract between the Respondent and its engineers governing their hourly rate of pay was not in writing, the Administrator simply ignores the testimony and the District Court's finding that the regular hourly rate of pay agreed upon was 80 cents per hour. The men themselves, with the help of the union, demanded that this hourly rate be converted to a salary on a regular 51-hour weekly schedule in an amount sufficient to compensate for overtime in order that they could obtain the privileges granted salaried employees and denied hourly paid employees. Thus, Mr. Glen O. Smith testified:

> "Q. Then the following question is this: Did the amount of salary per month include the scheduled overtime worked by these men on the three-shift basis at one and a half times their regular rate of pay per hour?

A. That is right, that is the way Mr. Seitz and I approached this question.

The Court: But that would have to be an estimate, it couldn't be exact?

The Witness: It couldn't be an exact figure.

The Court: Sometimes it might be over-payment, sometimes it would be under-payment.

The Witness: Yes, Judge. There were a number of factors that enter into that. These men, all of them, wanted to be on a salary rate because it took them into another class where they got so many other benefits they hadn't had. For example, if they were on salary if they were home sick for one day, one week or six months, they got their pay, their pay continues; while if they were working on hourly rate if they were absent just half an hour they didn't get paid for that. So there were many factors that entered into this, and the union and I sat down and negotiated this salary, which was acceptable to the union and the employees and contemplated regular time pay and regular overtime for the work which was agreed on at that time." (R. 97.)

The conversion, made in accordance with the agreement, although not originally mathematically correct was made so in August, 1941, when the Page and Spooner salaries were raised to $195 per month for the reasons stated by Mr. Glen O. Smith as follows:

"A. Well, I wouldn't want to say positively. Of course, the reason we made it $195 in August is because you add and subtract and multiply and get $195. The reason we made it $195 in August was because the union demanded it and got it." (R. 103.)

This contract arrived at through bargaining with the employees and the union was none the less a valid and enforceable wage contract although not reduced to writing. There is no prohibition against unwritten contracts in the National Labor Relations Act (49 Stat. 449, 29 U. S. C. A. sec. 151), and their validity is recognized in Ohio. *Ralston v. Kohl's Adm'r.*, 30 O. S. 92.

THE ADMINISTRATOR ASSERTS THAT EVEN THOUGH THE ENGINEERS WERE PROPERLY COMPENSATED FOR OVERTIME WHEN ORIGINALLY CONVERTED FROM AN HOURLY RATE TO A SALARY, SUBSEQUENT INCREASES CONSTITUTE A VIOLATION OF THE ACT.

The Administrator argues that even though the original conversion fulfilled the requirements of the Act, the Respondent was in violation the instant it gave its engineers an increase in salary. This is, indeed, a strange doctrine for the Administrator to advance. Such an argument is a negation of the avowed purpose of the Act. Congress, the Administrator himself, and the courts have asserted that a purpose of the Act is to put a floor under wages and to restrain employers from exploiting their employees. In spite of a diligent search Respondent has been unable to find any public statement by the Administrator or decisions of the courts which set forth as a purpose of the Act the placing of a ceiling or limitation upon increases in the compensation of employees.

When employers follow a policy of paying only the minimum wage rate of forty cents (40¢) an hour required by the Act and adopt the particular inflexible formula for computing overtime set up by the Administrator, they are apparently safe from the threat of actions by the Administrator seeking a permanent injunction. If the Administrator's position in the present case is any criterion then such employers will remain immune from suit so long as they do not change their wage plan and do not increase wages. On the other hand, employers who realistically seek to increase the morale and good will of their employees by offering to them the security of a monthly salary, paid whether they work or not, and increases in such salaries whenever possible, must do so at the peril of defending their course of action through the courts in an effort to avoid the penalty of a permanent injunction.

The Administrator cites the payment of the so-called "straight time overtime" made pursuant to war time wage

and salary controls as evidence of Respondent's intention to abandon or amend its original agreement with the engineers. The record is clear that during the war both Respondent and its employees were no longer free to bargain with respect to compensation without following intricate and complex rules and regulations and obtaining specific approvals for increases or decreases from the agencies charged with the administration of wage and salary controls (R. 117, 118).

The Administrator's argument ignores the fact that the so-called "straight time overtime" was simply a fiction resorted to by the Salary Stabilization Unit to avoid the necessity of approving basic increases which might exceed the "Little Steel Formula" used by the President during the war to hold wage and salary increases to a ceiling of 15% above the levels of 1941. The "straight time overtime" was not paid in lieu of overtime compensation required by the Fair Labor Standards Act but was in reality a fringe increase, the details of which were beyond Respondent's control. It is significant also that once having agreed to increases in compensation, no decreases in compensation below $5000 per year can be made without specific approval of either the Wage Stabilization Board or the Salary Stabilization Unit (Act of October 2, 1942, 56 Stat. 765 c. 578).

When Respondent is required to make a war time increase in a specific manner and is prohibited from changing the amount or manner of payment without obtaining approval it cannot be said to evidence an intention by the Respondent or its employees to change their basic understanding by which the salaries paid included both straight time and overtime for a 51-hour week.

In most of the cases decided by this Court adversely to the employer, the latter has been guilty of computing "the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purposes" as so aptly

stated by Mr. Justice Murphy in *Walling v. Helmerich & Payne Inc.*, 323 U. S. 37. In this case the Administrator in his brief has seized upon the establishment of the fiction of "straight time overtime" by the Salary Stabilization Unit in order to make computations and assumptions with respect to the regular hourly rate that are wholly unrealistic and artificial and which would certainly negate the statutory purposes.

It is a basic principle in the administration of social legislation, such as the Fair Labor Standards Act, that the Administrator as a representative of all the people, should seek to serve their best interests. It is pertinent to inquire, therefore, as to how such interests can be served if the Respondent must reduce the salaries of the engineers to $195.87 a month in order to satisfy an inflexible, artificial, and unrealistic formula set forth by the Administrator. Again, how can the Respondent make such a reduction in salaries in view of the existing prohibitions of the Wage Stabilization Board and the Salary Stabilization Unit against any reduction of war time wages and salaries? How can the best interests of the employer and the employee in the present case be served when possible resignation or strike action by the engineers may result from a reduction in their salaries or conversion to an hourly rate?

It is no answer to say that the Respondent can convert the engineers from a salary to an hourly rate. They don't want that. They want the assurance of a salary, whether they work or not, as well as all the other perquisites of a salaried employee, including year end bonuses, group life insurance, pension benefits, sick leave, and vacations with pay, not given to hourly rated employees.

THE ADMINISTRATOR ASSERTS THAT EVEN THOUGH THE RESPONDENT IS IN COMPLIANCE WITH RESPECT TO TWO OF ITS ENGINEERS IT CANNOT PLACE STEGMAN ON THE SAME BASIS.

It is true that Stegman was employed on a salary at the time the other engineers, Payne and Spooner, were changed from an hourly rate to a salary. This was because Stegman was formerly the Chief Engineer and had always received a salary as an executive. On or about the time Payne and Spooner went on a salary Stegman was demoted from Chief Engineer to an operating engineer at his own request for reasons of health (R. 64). Thus, he assumed the same position as Payne and Spooner, except that he was on the day shift while Payne and Spooner each had a night shift. The Respondent properly retained him on the same salary basis which included payment for straight time and overtime for a 51-hour week. Although he received $5 a month less than the other two engineers this was agreed to between Stegman and Respondent because he worked on the day shift and had the help of the Chief Engineer in the performance of his duties (R. 130).

The Administrator's argument is tantamount to a claim that the Respondent cannot use employees as engineers on a salary when they have not worked previously on an hourly rate. We do not believe such an unrealistic and impractical argument can have any weight with this Court.

CONCLUSION.

It is respectfully submitted that the considered opinions of the two lower Courts that the three engineers have been compensated for overtime in compliance with the Act are entitled to stand unless clear error is shown. The Administrator's treatment of the record in his brief and his request that this Court grant the petition and reverse the judgments of the two lower Courts "without further argument on the merits" (Admr.'s brief p. 14) appear to this

Respondent as an effort to avoid the sober consideration which ought to precede any such step.

The Administrator is asking for a permanent and all-inclusive injunction. The assertion of such a drastic remedy should call for restraint and sober reflection upon his part for there is little doubt that the courts approach the problem in that fashion.

> "The granting of an injunction is a drastic action, and the Court should not grant such orders unless it is clear that the violations of the Act are such as to clearly justify the order. Minor violations of the Act would not justify such drastic measures. Ample authority is readily found which leaves the matter to the sound discretion of the Court." *Walling v. Halliburton Oilwell Cementing Co.*, (52 F. Supp. 408).

Although the Administrator has admitted that Respondent at all times has acted in good faith, that the three employees involved are desirous of continuing the same arrangement and that the compensation and other benefits extended to these three employees are extraordinarily liberal in comparison to other employer-employee agreements, he has relentlessly pursued an injunction because of alleged violations of his technical, artificial and wholly unrealistic mathematical computations.

Respondent respectfully asks that the petition be denied.

Respectfully submitted,

CARL F. SHULER,
GLEN O. SMITH,
M. REESE DILL,
Attorneys for Respondent.